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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM ARTHUR KELLY,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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CAPITAL CASE

PETITIONER'S QUESTION PRESENTED

Whether the South Carolina courts' refusal to inform Petitioner's sentencing jury that he would never be eligible for parole if the jury sentenced him to life imprisonment rather than to death violated Simmons v. South Carolina, 512 U.S. 154 (1994).

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Respondent, State of South Carolina, hereby makes a Brief in Opposition to the Petition for a Writ of Certiorari to the South Carolina Supreme Court filed by William Arthur Kelly, who has been convicted in the South Carolina courts and sentenced to death. Respondent would show this Court the following:

CITATION TO OPINION BELOW

The decision of the Supreme Court of South Carolina affirming Petitioner's convictions and sentences is reported as State v. Kelly, 540 S.E.2d 851 (2001). This decision is reprinted in the Appendix to Petitioner's brief at pages 1-18.

JURISDICTION

The decision of the Supreme Court of South Carolina was entered on January 8th, 2001. This Court's jurisdiction is apparently invoked pursuant to 28 U.S.C. § 1257, Petitioner having asserted below, and asserting herein, deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

1. The Fourteenth Amendment to the United States Constitution, which forbids, in pertinent part, the deprivation of "life, liberty, or property, without due process of law."

2. Section 16-3-10 et seq. of the Code of Laws of South Carolina, which is reprinted in the Appendix to Petitioner's Brief.

RESPONDENT'S STATEMENT OF THE CASE

Petitioner, William Arthur Kelly, is presently confined to the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of

commitment from the Clerk of Court for Lexington County. During the November 1996 term, the Lexington County Grand Jury indicted Petitioner for murder, kidnapping, armed robbery, and possession or display of a knife during the commission of a violent crime. **{R. p. 2099-102}**. On October 14th, 1997 and February 16th, 1998, the state gave notice of intent to seek the death penalty, and on August 13th, 1998, the state served its Notice of Evidence in Aggravation.

The case was called for trial before the Honorable Gary E. Clary and a jury on September 14th, 1998. Public Defender Elizabeth C. Fullwood, H. Wesley Kirkland, Jr., and Hervery Young represented Petitioner at his jury trial. **{R. 1255 ll. 1-2}**. Eleventh Circuit Solicitor Donald V. Myers, Deputy Solicitor Francis A. Humphries, Jr., and Assistant Solicitor Gerald T. Chase were the prosecutors representing the state at trial. On September 17th, 1998, Petitioner's jury convicted him of all four charges.

The sentencing phase of his trial began on September 18th, 1998. After presentation of evidence, Judge Clary submitted the following aggravating factors to the jury:

(1) Murder committed while in the commission of a kidnapping;

(2) Murder committed while in the commission of a burglary;

(3) Murder committed while in the commission of a robbery while armed with a deadly weapon;

(4) Murder committed while in the commission of larceny with use of a deadly weapon;

(5) Murder committed while in the commission of physical torture.

{R. 2071 ll. 8-17}. The following mitigating factors were submitted to the jury:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person;

(2) The age of the defendant at the time of the crime;

(3) The defendant was below the age of eighteen at the time of the crime.

Judge Clary also instructed the jurors that they could consider any non-statutory mitigating circumstance. **{R. 2076 ll. 7-18}**.

On September 19th, 1999, Petitioner's jury found the existence of all five (5) aggravating factors and recommended a sentence of death. That same day, Judge Clary sentenced Petitioner to death for murder, to thirty (30) years for armed robbery, and to a consecutive five (5) years for possession of a knife during commission of a violent crime. Since Petitioner was sentenced to death, Judge Clary did not sentence him for kidnapping pursuant to the rule in section 16-3-910 of the Code of Laws for South Carolina. **{R. 2094 l. 18 - 2095 l. 14; 2096 l. 3 - 2097 l. 10}**.

A timely Notice of Appeal was filed and served on September 21st, 1998. In the direct appeal to the South Carolina Supreme Court, Petitioner was represented by Assistant Appellate Defender Robert M. Dudek. Assistant Attorney General S. Creighton Waters represented Respondent. Both parties filed briefs in the appeal, and Petitioner presented the following issues relevant to the present Petition for Writ of Certiorari:

I. Whether the judge denied Due Process by refusing to instruct the jury that "life imprisonment" meant imprisonment "until death of the offender", since the state offered evidence of future dangerousness, the solicitor argued future dangerousness, and appellant's request to charge #1 was a correct statement of South Carolina law, was mandated by Simmons v. South Carolina, and the judge had a duty to charge it?

II. Whether the judge erred by refusing to charge, in the alternative, that future dangerousness was not an issue, since the state stipulated that future

dangerousness was not an issue, and appellant was entitled to have that stipulation, defense request to charge #2, heard by the jury?

The South Carolina Supreme Court heard oral argument on September 20th, 2000, and the court issued its opinion affirming Petitioner's conviction and sentence on January 8th, 2001. State v. Kelly, 540 S.E.2d 851 (S.C. 2001). On January 23rd, 2001, Attorney Dudek filed on behalf of Petitioner a "Petition for Stay of Execution". The Remittitur was sent down on January 24th, 2001. On January 25th, 2001, the state filed a letter Return in which it did not object to Petitioner's requested stay of execution. The South Carolina Supreme Court on February 7th, 2001 granted the motion for stay of execution.

Petitioner sent his Petition for Writ of Certiorari to the United States Supreme Court on April 3rd, 2000, and this Petition was docketed on April 5th, 2000.

RESPONDENT'S STATEMENT OF FACTS

Although the defense requested and the judge gave a charge on voluntary manslaughter at trial, it is undisputed that Petitioner brutally killed 25-year-old Shirley Slade Shealy by stabbing her over thirty (30) times at a Kentucky Fried Chicken (KFC) restaurant in Batesburg.

A. Background

Shealy was the manager of the Batesburg KFC up until the time of her death. Petitioner was Shealy's former employee who worked at the KFC from February 27th, 1995, until December 8th, 1995. **{R. 1257 l. 9 - 1258 l. 5; 1490 ll. 6-19; 1501 l. 23 - 1502 l. 10}**. Shealy and Petitioner's family knew each other fairly well; indeed, Shealy and Petitioner's older sister were best friends. **{R. 1857 l. 4-12; 1902 l. 21 - 1905 l. 18}**. Shealy was married with one young son, Alex, and at the time of her death she was about six months'

pregnant with her second child, Sidney Bruce Shealy. **{R. 1849 l. 2 - 1850 l. 6; 1858 ll. 3-7; 1874 l. 20 - 1876 l. 20}**.

B. Guilt Phase

Petitioner spent the afternoon and early evening of January 5th, 1996 hanging out at the KFC with his former co-workers, including Shealy. Petitioner left the KFC between 6:00 and 8:30 p.m. **{R. 1259 l. 14 - 1260 l. 1; 1379 ll. 7-23; 1492 l. 7 - 1493 l. 2}**.

At about 10:25 p.m., Shealy and her co-worker Barbara Adams closed and locked up the KFC. Before they left, Shealy locked the money taken in that afternoon and evening into a floor safe in the KFC's office. Adams had to wait for her car to warm up, and Shealy drove out of the parking lot towards her home. Adams never saw Shealy alive again. **{R. 1260 l. 2 - 1267 l. 25; 1270 ll. 11-13}**.

Somewhere between 10:00 and 11:00 p.m. that night, Jason Hite was riding by the KFC with a friend. Hite noticed a car parked at an angle in the KFC's lot with its headlights on and its driver's side door open. **{R. 1277 l. 9 - 1281 l. 22}**. In his statement to police, Hite said he saw the victim walking up to the door. **{R. 1283 l. 14 - 1284 l. 12}**.

A little later, Officer Stephen Clare of the Batesburg-Leesville Police Department drove past the KFC while patrolling the area. Officer Clare became suspicious when he saw Shealy's car with its driver's door open and the motor running. As he pulled into the KFC's lot, he noticed what appeared to be someone ducking down in the area of the manager's office. Clare got out of his cruiser, went to the front door, and found it unlocked. He entered the KFC, and discovered Shealy's body amidst a bloody scene. Concerned that the perpetrator might still be inside, he exited the KFC, called for backup, and

attempted to cover the exterior of the building by himself. **{R. 1285 l. 7 - 1295 l. 7}**.

Backup arrived shortly, but the officers found no one when they cleared the building. **{R. 1294 ll. 1-12}**. While they were clearing the building, Chief Oswald of the Batesburg-Leesville Police Department checked the victim, but she was already dead. **{R. 1324 l. 16 - 1326 l. 18}**. When she was found, Shealy's hands were bound behind her back with duct tape. There was also an overturned chair covered with blood that had duct tape on it. A piece of an opaque latex glove was found attached to the duct tape, and a bloody dive knife was found on a rack in the kitchen. Over $1000 in cash was scattered throughout the scene, including a number of bills found stuck to the victim with her own blood. When the floor safe was later opened, it was virtually empty except for a ripped deposit bag and a deposit slip. **{R. 1292 l. 14 - 1293 l. 15; 1302 ll. 2-25; 1337 l. 20 - 1339 l. 23; 1423 l. 16 - 1442 l. 1; 1510 l. 2 - 1511 l. 21; 1565 ll. 19-25}**.

Large amounts of blood spatter throughout the kitchen and hallway of the restaurant indicated a struggle and repeated violent blows during Petitioner's sustained assault on Shealy. **{R. 1437 l. 18 - 1449 l. 19}**. The pathologist, Dr. Sexton, testified that there were thirty-one (31) stab or incision wounds to Shealy, including around twenty (20) wounds to her back. Petitioner also slit Shealy's throat from ear to ear, severing both her jugular vein and her airway. As noted before, Shealy's hands were bound behind her back, and consequently she had no defensive wounds. **{R. 1560 l. 12 - 1570 l. 13}**.

Near the victim's car, the officers found a page from a child's coloring book lying on the ground. The officers noticed that most of the assorted items inside the victim's car had been shoved over onto the backseat floorboard on the passenger side. Suspiciously, the

backseat floorboard on the driver's side was relatively clear, except for some coloring book pages which were mashed down as if someone had been lying on them. **{R. 1295 ll. 8-14; 1331 l. 9 - 1333 l. 11; 1451 l. 13 - 1454 l. 19}**.

Investigating officers also noticed that while the KFC's rear door was locked the drive-thru window was unlocked. **{R. 1328 l. 18 - 1330 l. 18; 1450 ll. 5-11}**. A SLED bloodhound picked up a trial running away from the KFC, over a fence, and into a grassy lot near a dumpster. In the lot, police found a tire spin-off mark. **{R. 1310 l. 8 - 1320 l. 20; 1334 l. 17 - 1335 l. 16}**.

Police promptly started interviewing KFC employees and others who were at the KFC on January 5th. Eventually, they attempted to contact Petitioner, but they found out he did not come home that night. Petitioner's mother filed a missing persons report on Petitioner the next day. **{R. 1335 l. 20 - 1337 l. 7}**.

The break in the case came on the afternoon of January 8th, when Petitioner's mother contacted Chief Oswald and told him Petitioner was at his sister's house in Lowell, Massachusetts. Oswald then called Lowell police and gave them the sister's address and a description of Petitioner. **{R. 1340 l. 4 - 1341 l. 17; 1353 l. 23 - 1354 l. 24}**. There, Lowell police found Petitioner, who orally admitted to the murder. The Lowell police then took Petitioner to the station, where he gave and signed a written statement. Petitioner claimed he had to stab Shealy because she kept trying to have sex with him. **{R. 1358 l. 2 - 1364 l. 25; 1365 l. 20 - 1374 l. 3}**.

When Lowell police searched Petitioner, they found $90 in cash stained with Shealy's blood. **{R. 1387 ll. 8-10; 1470 ll. 13-22; 1555 ll. 20-24}**. Petitioner's car also

contained his pants, T-shirt, and shoes covered in the victim's blood. **{R. 1462 l. 25 - 1464 l. 21; 1556 ll. 4-11}**. Finally, sneakers found in Petitioner's car matched bloody footprints found at the scene. **{R. 1475 l. 19 - 1476 l. 19}**.

Further proof of Petitioner's robbery plan came from employees of the KFC, who testified that it was common knowledge among employees that money taken in after late afternoon was kept overnight in the floor safe. **{R. 1258 ll. 6-20; 1490 l. 17 - 1491 l. 22}**. The employees also testified that the knife, duct tape, and latex gloves used by Petitioner were not of the type normally used by the KFC. **{R. 1268 l. 1 - 1270 l. 6; 1495 l. 13 - 1497 l. 15; 1500 l. 1 - 1501 l. 22}**.

The defense rested without presenting a case.

C. Penalty Phase

The state presented testimony and evidence from Dr. Sexton and SLED crime scene analysts about Petitioner's exceptionally brutal and prolonged assault on Shealy, who, as noted before, was six months' pregnant. **{R. 1802 l. 1 - 1819 l. 25; 1823 l. 10 - 1840 l. 22}**. Dr. Sexton testified that Shealy's baby was healthy and normal, and might have even survived had it been born at the time of the mother's death in a hospital setting. **{R. 1840 l. 23 - 1842 l. 22}**. The state also presented victim impact testimony from family members about the devastating effect Shealy's death had on her husband, young son, parents, in-laws, and siblings. **{R. 1848 l. 4 - 1880 l. 5}**.

Jail guards testified about Petitioner's behavior in prison, including an incident where Petitioner refused to obey orders. **{R. 1666 ll. 17-25}**. Petitioner also was in a small cell with two others where correctional officers discovered that the mortar around a cinder block

had been dug away. The inmates attempted to conceal the work by stuffing colored toilet tissue in the cracks. **{R. 1671 l. 19 - 1677 l. 20; 1695 l. 4 - 1701 l. 18; 1717 l. 5 - 1720 l. 23}**.

Petitioner also told a fellow inmate that he and the victim were staging a robbery, but he overheard her turning him in so he tried to decapitate her with the knife. The inmate also testified that Petitioner frequently talked of escape and even targeted a particular slightly-built female guard as his hostage. One time, Petitioner hid a shank in his hand when he called the guard over to the cell door, but he ultimately backed out of his escape plan. **{R. 1736 l. 2 - 1746 l. 6}**. A correctional officer confirmed finding on Petitioner a shank made from a toothbrush and a metal object. **{R. 1761 ll. 9-16}**.

Another former inmate testified that Petitioner bragged about his crime, asked other inmates to call him "KFC," and talked about taking a nurse hostage. **{R. 1769 l. 18 - 1771 l. 9}**. Petitioner carried a styrofoam cup on which he had drawn a knife, a decapitated chicken, and the words "KFC". **{R. 1747 ll. 4-22; 1771 ll. 10-22}**.

The defense case began first with evidence that Petitioner had no history of significant criminal convictions or juvenile adjudications. **{R. 1886 ll. 8-18; 1888 ll. 6-15}**. Petitioner's mother testified that he had a normal childhood and even did well academically until high school, when his grades went bad and he started getting into trouble. **{R. 1893 l. 6 - 1903 l. 6}**.

A defense psychologist stated that Petitioner has average intelligence and no mental illnesses. The most the psychologist could say is that Petitioner might have been on his way to an alcohol problem. According to the psychologist, Petitioner is adaptable

to prison, and Petitioner's possession of a shank, talk of escape, and drawing of a decapitated chicken was just the typical "puffing" often done by younger, smaller-built inmates. **{R. 1911 l. 22 - 1926 l. 9}**. On cross-examination, the psychologist admitted that Petitioner has violent fantasies of getting away with killing people who have wronged him, and that he had tortured and killed small animals. **{R. 1926 l. 20 - 1928 l. 15; 1958 l. 25 - 1959 l. 11}**.

Former warden James Aiken also testified Petitioner was adaptable to prison life and easily managed and contained by the South Carolina Department of Corrections. Aiken theorized that Petitioner might be victimized in the harsh world of prison. **{R. 1971 l. 1 - 1996 l. 17}**.

REASONS WHY CERTIORARI SHOULD BE DENIED

Since the prosecution did not rely on Petitioner's future dangerousness as a basis for death, there was not due process right of rebuttal with information about the unavailability of parole; in any event, the defense closing argument satisfied the rule in Simmons v. South Carolina.

Since the unavailability of parole does nothing to rebut arguments that Petitioner will be an escape threat or will be dangerous in the future to other inmates or prison staff, the South Carolina Supreme Court properly ruled that Simmons's[1] due process right of rebuttal was not triggered. Further, the prosecution's other evidence and argument in this case did not rely or raise future dangerousness as a basis for death; thus, the first prong of Simmons was not satisfied and due process did not require a life without parole charge. Finally, there is a distinction between merely pointing out a defendant's other bad acts and

[1] Simmons v. South Carolina, 512 U.S. 154 (1994).

expressly relying on future dangerousness as a basis for death, and the former does not trigger application of the rule in Simmons.

A. How the federal question was raised and decided below

1. Events at trial

Before arguments, the defense requested the judge charge from S.C. Code § 16-3-20(A) that a life sentence meant "until death of the offender", and cannot be reduced by parole, community supervision, any type of work or early release program, or any type of credits. After the solicitor stated that there were no Simmons issues because he was not going to argue future dangerousness, the defense asserted the state had in fact raised future dangerousness through evidence of escape attempts, a plan to take a guard hostage, and cross-examination of the defense experts on jail records. In response, the solicitor stated that those only went to past conduct, and he did not bring in a mental health expert to testify Petitioner would be dangerous in the future. The solicitor also noted the distinction under Simmons between danger to those inside prison and danger to outside society. Later the defense argued that due process required the charge so that the defense could rebut the state's evidence, and show a basis for a sentence less than death. The trial court ultimately ruled that the future dangerousness prong of Simmons had not been met, and denied the request to charge. **{R. 2000 l. 25 - 2004 l. 11; 2007 ll. 12-24; 2011 l. 22 - 2013 l. 12}**.

After the trial court denied the defense's request for the verbatim charge from subsection 16-3-20(A), Petitioner asked for a plain and ordinary meaning charge. Petitioner also requested a charge that the state had stipulated future dangerousness was

not an issue in the sentencing proceeding. The court denied the latter request. **{R. 2007 l. 25 - 2009 l. 20}**.

The defense objected on a few occasions that the solicitor was arguing future dangerousness during the state's closing. **{R. 2037 ll. 8-23; 2039 l. 10 - 2040 l. 6}**. During their closing, defense counsel repeatedly stressed that Petitioner would be in prison for the rest of his life. **{R. 2049 ll. 17-22; 2051 ll. 6-9; 2056 ll. 10-12; 2060 ll. 7-11}**. The judge gave the jury a plain an ordinary meaning charge. **{R. 2069 ll. 2-4}**. After the charge, defense counsel renewed her request for a charge from subsection 16-3-20(A), or, in the alternative, for a charge that the state had stipulated future dangerousness was not an issue. **{R. 2082 ll. 22-25}**.

2. The direct appeal to the South Carolina Supreme Court

In State v. Kelly, the South Carolina Supreme Court found that the Simmons rule was not triggered because the prosecution had not raised future dangerousness:

> To be entitled to a Simmons charge, two prongs must be met. First, the State must put the defendant's future dangerousness in issue. Second, the only available alternative sentence to death is life imprisonment without possibility of parole. Id. at 178 (O'Connor, J., concurring); see also State v. McWee, 322 S.C. 387, 391-92, 472 S.E.2d 235, 238 (1996) (due process requires parole ineligibility charge "only if appellant's future dangerousness was an issue and only if appellant would have been ineligible for parole upon the imposition of a life sentence"). Kelly has not met either prong of the Simmons test.
>
> First, we agree with the trial court that the State's evidence at sentencing did not implicate future dangerousness. Evidence that Kelly took part in escape attempts and carried a shank simply is not the type of future dangerousness evidence contemplated by Simmons. [FN8]
>
> FN8. When the State argues future dangerousness, it "urge[s] the jury to sentence the defendant to death so that he will not be a danger to the public if released from prison." Simmons,

512 U.S. at 163 (emphasis added).

The underlying principle of the Simmons holding is that if evidence of future dangerousness is presented by the State, the defendant must be allowed to rebut this evidence by showing that he will never be eligible for parole, i.e., that he will never legally be let out of prison. In the instant case, however, Kelly argues that the evidence he is an escape threat (and thus a risk to the general public) required that the jury be instructed on parole ineligibility. The flaw in Kelly's argument is that a Simmons charge would not rebut this evidence. Telling a jury that a convicted murderer will never be eligible for parole simply does not respond to the State's evidence that he presents an escape risk.

In our opinion, the evidence presented by the State in the penalty phase was designed to show that Kelly would not adapt to prison life because in jail he had been caught carrying a weapon and planning or participating in escape attempts. Kelly was allowed to rebut this evidence, through both cross- examination of the State's witnesses and the witnesses presented in his defense. [FN9]

> FN9. Kelly presented expert testimony from a clinical psychologist, Dr. Steven Shea, and a correctional management consultant, James Aiken. Dr. Shea testified that Kelly could adjust to prison. Aiken testified that Kelly could be "adequately managed, housed and secured without endangerment in a correctional facility within the South Carolina Department of Corrections."

Thus, Kelly was given the opportunity to deny or explain the State's evidence, in accordance with due process requirements.

Kelly further contends that the State argued future dangerousness to the jury and thus misled the jury in violation of his due process rights. Specifically, Kelly argues that the State's argument that Kelly is worse than a serial killer and that "murderers will be murderers" constituted argument on future dangerousness. We disagree. A fair reading of the State's closing argument shows that the State consciously avoided any implication of future dangerousness. Not once did the State suggest to the jury that it should impose the death penalty because Kelly would be a future danger to the general public. Cf. Simmons, supra (where the Court found the following arguments to be generalized argument of future dangerousness: "what to do with [petitioner] now that he is in our midst" and that the death penalty would be "a response of society to someone who is a threat. Your verdict will be an act of self-defense"). Instead, the State argued Kelly should be given the death penalty primarily as retribution for the heinous nature of the murder

and because of the status of Shealy, the pregnant victim.

> We hold that future dangerousness was not an issue in this case. It was neither a logical inference from the evidence nor was it injected into the case through the State's closing argument.

The Kelly court also went on to hold in the alternative that the Simmons rule was not triggered because at the time of the judge's charge a thirty year definite term sentence was a possibility, and life without parole was not the only available alternative sentence to death. Kelly, 540 S.E.2d at 857-58. This alternative rationale has since been overruled by this Court's decision in Shafer v. South Carolina, 121 S.Ct. 1263 (2001).

A. Simmons is not triggered by prosecution argument as to a defendant's future dangerousness to other prisoners and prison staff, because information about the unavailability of parole does nothing to rebut such arguments.

The South Carolina Supreme Court ruled that evidence of and argument about Petitioner's misconduct while in pretrial detention did not trigger Simmons, because the unavailability of parole does nothing to rebut evidence showing Petitioner's future dangerousness *while in prison*. Kelly, 540 S.E.2d at 857. Petitioner contends that there is no basis in law or logic for the "inside prison/outside society" distinction. He is incorrect.

The Simmons rule is based in the due process right of a capital defendant to rebut the state's evidence in aggravation. 512 U.S. at 164-65 (discussing Skipper v. South Carolina, 476 U.S. 1 (1986), and Gardner v. Florida, 430 U.S. 349 (1977)). The idea is that "when the State seeks to show future dangerousness, however, the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case". Simmons, 512 U.S. at 177 (O'Connor, J., concurring). Future dangerousness argument was defined as "urg[ing] the jury to sentence the defendant to

death so that he will not be a danger to the public *if released from prison*". Simmons, 512 U.S. at 163 (emphasis added). Indeed, the Simmons plurality noted its due process concern was that "there may be no greater assurance of a defendant's future nondangerousness *to the public* than the fact that he never will be released on parole". Id. at 164 (emphasis added).

Thus, the rationale is obvious for distinguishing between argument about future dangerousness to the public, which would trigger Simmons, and argument about dangerousness while inside prison, which would not: whether or not the defendant may be released from prison on parole is irrelevant if the prosecutor is only arguing that the defendant will be an escape threat or will be dangerous to other inmates and prison staff. Since life without parole does absolutely nothing to respond to dangerousness inside prison, there is no corresponding due process right of rebuttal.

This "inside prison/outside society" distinction finds its authorization in both the plurality and concurring opinions of Simmons itself. See Simmons, 512 U.S. at 165 n.5 ("Of course, the fact that a defendant is parole ineligible does not prevent the state from arguing that the defendant poses a future danger. The state is free to argue that the defendant will pose a danger to . . . inmates or prison staff.") (plurality); 512 U.S. at 177 ("Of course, in such cases the prosecution is free to argue that the defendant would be dangerous in prison.") (concurrence). The appropriateness of this distinction is further supported by the fact that both the plurality and the concurring opinions made much of the testimony in Simmons that the defendant was only dangerous to elderly women and thus would not pose a threat to the men in prison. 512 U.S. at 157-58, 176.

Further, other jurisdictions have also applied or recognized the distinction between

"inside prison" and "outside society" future dangerousness evidence or argument. United States v. Flores, 63 F.3d 1342, 1368 (5th Cir. 1995) (focus on danger in prison makes case "materially different" from Simmons); Allridge v. Scott, 41 F.3d 213, 221-22 (5th Cir. 1994); State v. Richmond, 495 S.E.2d 677 (N.C. 1998); Collier v. State, 959 S.W.2d 621, 623 (Tex. Crim. App. 1997) (en banc).

Finally, Petitioner contends evidence that he was dangerous inside the highly restrictive environment of prison is *necessarily* evidence that Petitioner would be more dangerous in the free climate of society, regardless of how the prosecution argues the evidence. Surely, prison is a more restrictive environment than society; however, it is common sense that a prison is a far more dangerous and violent place than the Petitioner's small hometown of Batesburg, South Carolina, or most any other residential neighborhood in the country. It cannot simply be assumed that people necessarily behave *better* in a maximum security lockup than they would in free society, so that if they are dangerous in prison they must necessarily be more dangerous in society. The South Carolina Supreme Court was thus correct in concluding that such evidence went to show Petitioner was not adaptable to prison, and not to prove his future dangerousness to the general public. See Kelly, 540 S.E.2d at 857.

Indeed, the defense presented expert evidence that Petitioner's possession of a shank, talk of escape, and drawing of a decapitated chicken was just the typical "puffing" often done by younger, smaller-built inmates. **{R. 1911 l. 22 - 1926 l. 9}**. Thus, the mitigation evidence was that prison was *causing* Petitioner to behave violently, not that its more restrictive environment caused him to behave.

Since a life without parole alternative sentence does not rebut evidence about Petitioner's misbehavior in prison, the South Carolina Supreme Court properly ruled that Simmons was not triggered.

B. The prosecution's evidence and argument in this case did not raise future dangerousness.

Petitioner next argues that the state's other argument and evidence raised future dangerousness.

1. "A little more dangerous . . ."

Petitioner first points to the following statement of the prosecution in argument:

> SOLICITOR: Mercy? Mitigation? If you find it, folks, speak it out for what he's done. And, you know what, what did his own witness say. He doesn't have any mental illness. He's intelligent. He's not retarded. He's quick-witted. *Doesn't that make somebody a little more dangerous—*
>
> DEFENSE ATTORNEY: Objection, Your Honor.
>
> THE COURT: Just a moment. Yes, ma'am. State your grounds.
>
> DEFENSE ATTORNEY: The Solicitor has stipulated dangerousness is not an issue—
>
> SOLICITOR: *—For this lady, this crime on January the 5th, doesn't that make him more unpredictable for Shirley Shealy.* When you let your guard down and they stab you in the back. That's what we have here. That's what we do know. That's what he did. He made his own mother admit that. He made his own family victims.

{R. 2037 ll. 8-23} (emphasis added).

Respondents argued to the state supreme court that since the trial court never ruled on this objection, and Petitioner never subsequently mentioned this passage at trial as a basis for a life without parole charge, then consideration of it was not preserved for appeal. Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (issues not raised or ruled upon

below are not preserved for review). The state court opinion mentioned the passage in its description of the facts, but never addressed it in its analysis. Kelly, 540 S.E.2d at 856-57. As such, consideration of it is not preserved for review before this Court. See generally Stembridge v. Georgia, 343 U.S. 541 (1952); Bailey v. Anderson, 326 U.S. 203 (1945) (state appellate court must actually consider point not raised to trial court in order for United States Supreme Court to have jurisdiction).

In any event, it is true the solicitor stated "doesn't that make somebody more dangerous." However, in the very next statement the solicitor *immediately* tied his "dangerous" comment into the particular crime committed against Shealy. **{R. 2037 ll. 18-20}**. The statements were part of the solicitor's argument that Petitioner facilitated his plan of robbery and murder by preying on a good friend of his family likely to trust him. The solicitor also was pointing out that Petitioner was under no mental illness or mental deficiency which might mitigate his punishment. These statements referred to the crime already committed and did not raise future dangerousness to society. See generally Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (court should not lightly infer that prosecutor intended most damaging meaning with statement in closing).

2. "Bloody Billy"

Next, Petitioner asserts future dangerousness argument from the following passage:

> Stabbing her while you're down. Kick her while you're down. Keep on plunging, keep on slicing, hacking, *bloody Billy, the butcher of Batesburg*—
>
> DEFENSE ATTORNEY: Objection to the inflammatory nature, your Honor—
>
> THE COURT: Just a—
>
> DEFENSE ATTORNEY: Objection to the inflammatory nature of that

> argument.
>
> THE COURT: Overruled.
>
> THE SOLICITOR: *Bloody Billy and the butcher of Batesburg* and he wants mercy—
>
> DEFENSE ATTORNEY: Objection to the reference of—
>
> THE COURT: Just one moment, Solicitor.
>
> DEFENSE ATTORNEY: Objection to the referral as Bloody Billy.
>
> THE COURT: I'll sustain the objection and ask that the jury disregard that statement. That it be stricken from the record.
>
> THE SOLICITOR: They call him Billy. Let me show you something, folks. What do you see in these pictures? Does that connect the two? But they want you to think of him as Little Billy. *Little Billy, the kid. I know another Billy, the kid, that he reminds me of.* He's not a kid. He's a killer. And he committed a man-sized crime and he needs a man-sized punishment. That's what we are dealing with. And he butchered her. There's no doubt about it. And he's from Batesburg. So if you want to put those two together, you say it if I can't, the butcher of Batesburg.
>
> DEFENSE ATTORNEY: Objection, again, Your Honor.
>
> THE COURT: Sustain the objection.
>
> THE SOLICITOR: That's what he is.
>
> THE COURT: Ladies and gentlemen of the jury, please disregard the Solicitor's comment. It is stricken from the record.

{R. 2035 l. 15 - 2036 l. 24}.

Respondents argued to the state supreme court that Petitioner did not preserve any alleged Simmons issues with these comments, because: (1) Petitioner only objected to the "Bloody Billy" statement as inflammatory, (2) he did not subsequently argue to the trial court that the solicitor went too far into the realm of future dangerousness with these

statements, and (3) the trial court sustained the objection and struck the comment, and Petitioner did not request any further relief. See generally State v. Tucker, 319 S.C. 425, 462 S.E.2d 263 (1995) (party cannot argue one ground below and another on appeal); State v. Silver, 314 S.C. 483, 431 S.E.2d 250 (1993) (ground asserted on appeal must be supported by objection raised at trial). In its opinion, the state supreme court did not mention any of the above-quoted passage during either its description of the facts or its analysis. Kelly, 540 S.E.2d at 856-57. As such, consideration of it is not preserved for review before this Court. See Bailey v. Anderson, 326 U.S. 203 (1945) (state appellate court must actually consider point not raised to trial court in order for United States Supreme Court to have jurisdiction).

In any event, the statement "Bloody Billy, butcher of Batesburg" in no way reflected on future dangerousness but merely emphasized the brutal nature of Petitioner's crimes. It followed the solicitor's graphic description of the attack on Shealy. **{R. 2035 ll. 3-17}**. Whether the reference was inflammatory is not an issue on appeal. However, the statement was based in the evidence, because the crime was exceptionally bloody, and Petitioner stabbed Shealy so repeatedly and deeply that "butchering" is a fair word. Cf. United States v. Pungitore, 910 F.2d 1084 (3rd Cir. 1990) (reference to defendants as "cold-blooded killers" and "mob killers" fair comment on the evidence). The statement referred to the crime Petitioner had already committed and did not raise future dangerousness. See generally Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (court should not lightly infer that prosecutor intended most damaging meaning with statement in closing).

3. "Murderers will be murderers . . ."

Petitioner next mentions portions of the solicitor's discussion on Petitioner's behavior in jail. After stating that Petitioner had learned from his "mentor," jailhouse informant Matthew McCormack, the solicitor commented on the fact that Petitioner did not report the digging of the mortar around a cell's cinder block. The following then occurred:

> SOLICITOR: Oh, no. He doesn't have anything to do with it and that toothbrush he had with the metal tip in it, oh, that's just being a big man, to clean his fingernails. That's not to hurt anybody, not Ms. Marsha Price, the lady everybody says—
>
> DEFENSE ATTORNEY: Objection, Your Honor. He's — I think he's going afield to what we stipulated to on the future problems.
>
> SOLICITOR: I am talking about—
>
> THE COURT: Solicitor, if you would, please limit your argument to what we discussed, sir.
>
> SOLICITOR: I am talking about what happened from the witnesses who testified on this stand. And didn't you hear a woman named Marsha Price who worked at the Lexington County Jail. Didn't they say that she was the one most gullible, the one you could take hostage? Didn't you hear he had that shank behind his back calling her to the door—
>
> DEFENSE ATTORNEY: Objection, Your Honor—
>
> SOLICITOR: —If you didn't hear that, disregard it—
>
> DEFENSE ATTORNEY: This is going outside the scope of the situation.
>
> THE COURT: Overruled—
>
> DEFENSE ATTORNEY: —Stipulation—
>
> THE COURT: Overruled.
>
> SOLICITOR: If you didn't hear somebody testify to that, folks, you hold it against me and not against the family out here, please. But I swear I heard that from the stand. But you take it as you heard it. That's just shanks will be shanks. And murderers will be murderers. And he is the cold-blooded

one right over there.

{R. 2038 l. 20 - 2040 l. 12}.

The state supreme court correctly found that the statements did not address future dangerousness to society as a whole. Kelly, 540 S.E.2d at 857. The "murderers will be murderers" statement clearly related to Petitioner's plan to take a guard hostage while in pretrial detention. Assuming the statement did raise future dangerousness, it went solely to Petitioner's future dangerousness in prison and lack of adaptability to prison life, which, as argued before, did not trigger Simmons.

4. "More frightening than a serial killer . . ."

Petitioner next points to the following argument:

> SOLICITOR: No prior convictions of violence against another person; below the age of eighteen. You know something, a person that commits an uncharacteristic and an unpredictable crime is more frightening than a serial killer, more frightening than a career criminal. Is that person uncharacteristicall [sic], because he hadn't done it before? You kind of trust them a little bit.
>
> Unpredictably because of his age. You don't think they will do anything. Those people are supposed to be kind, supposed to be your friend, supposed to be nice; supposed to be kind. Well, that's the kind that while they are hugging you with kindness, they're getting ready to kill you with kindness. Does that go in his favor—
>
> DEFENSE ATTORNEY: Objection, Your Honor—
>
> THE COURT: Yes, Sir.
>
> DEFENSE ATTORNEY: —Inflammatory.
>
> THE COURT: Overruled.

{R. 2029 l. 13 - 2030 l. 4}.

The state supreme court found that the statements did not address future

dangerousness to society as a whole, and that they suggested death was appropriate because of the heinous nature of the murder and the status of Shealy as a friend of the family and pregnant woman. Kelly, 540 S.E.2d at 857.

This argument was the solicitor's challenge to the mitigating factor of the defendant's age. Indeed, rather than say Petitioner was a future danger, the solicitor called his crime uncharacteristic, and by implication said Petitioner was NOT a career criminal or serial killer. Moreover, the solicitor was arguing about the circumstances of Petitioner's crime, that he stalked and killed a close family friend who would have been more trusting and vulnerable. Thus, the argument did not raise future dangerousness but merely highlighted the callous premeditation of Petitioner's past crimes. See generally Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974) (court should not lightly infer that prosecutor intended most damaging meaning with statement in closing). Future dangerousness was not implicated.

Finally, Petitioner asserts the prosecution raised future dangerousness with the solicitor's cross-examination of defense experts on Petitioner's obsessive thoughts of killing people and his history of torturing and killing small animals. **{R. 1927-28; 1959}**. Petitioner did not object to this cross-examination at trial, and did not assert it as a reason why the prosecution had raised future dangerousness. Petitioner also did not mention this cross-examination in his brief to support his position before the state supreme court, and the state supreme court did not address nor refer to this cross-examination in either its description of the facts or its resolution of the Simmons issue. Kelly, 540 S.E.2d at 857. Therefore, consideration of it is not preserved for review before this Court. See Bailey v. Anderson, 326 U.S. 203 (1945) (state appellate court must actually consider point not

raised to trial court in order for United States Supreme Court to have jurisdiction).

In any event, the defense stated the witness's only purpose was to testify as to adaptability to prison, and when the cross-examination is read in context, it is clear it was directed towards challenging the witness's opinion that Petitioner was adaptable. **{R. 1935 ll. 4-7; 1909-62}**. As noted before, the Simmons rule is based in the due process right of rebuttal to the prosecution's raising of future dangerousness as a basis for death. 512 U.S. at 164-65. The prosecution cannot be viewed as having raised future dangerousness before the jury as a basis for death, and thereby creating a corresponding right of rebuttal, when the prosecution merely cross-examined the defense's mental health expert on how relied-upon information in the mental health records affected the expert's opinion about adaptability to prison.

Further, most of the cross-examination focused on Petitioner's possession of a shank, plan to take a guard hostage, and Petitioner's likely experience in prison. **{R. 1927-59}**. At worst, the cross-examination did not trigger Simmons because it went to future dangerousness in prison.

Finally, Petitioner contends that the evidence in argument in this case raised future dangerousness more explicitly than anything in Simmons itself. This is incorrect. In Simmons, expert witnesses from the prosecution stated that Simmons posed a continuing risk to elderly women. The prosecution in the present case put up no such witnesses. In Simmons, the prosecutor told the jury that a death sentence would be "the response of society to someone who is a threat", and that the death verdict would be an act of "self-defense". Such statements are obviously patent references to the defendant's future

dangerousness and his continuing danger to society as a whole. No such argument was made in this case.

Since the prosecution in this case did not raise Petitioner's future dangerousness to society as a whole as a basis for death, the South Carolina Supreme Court correctly ruled that the rule in Simmons was not triggered.

C. There is a distinction between an express future dangerousness case and merely pointing out the defendant's other bad conduct; in order for a due process right of rebuttal to be triggered, the state must raise Petitioner's future dangerousness to society.

Finally, Petitioner seems to challenge the premise that future dangerousness argument by the prosecution, or at least some express reliance on future dangerousness by the prosecution, is necessary to satisfy the first prong of the Simmons test. Petitioner contends there is no difference between pointing out a defendant's other prior bad acts, and asserting his continued dangerousness is a basis for death.

Such a view is as odds with this Court's expression of the Simmons rule. See Ramdass v. Angelone, 120 S.Ct. 2113, 2117 (2000) (plurality opinion) (state submitted to the jury a future dangerousness aggravating circumstance); 120 S.Ct. at 2126 (concurring opinion) (noting that the state must seek "to demonstrate that the defendant poses a future danger to society"); 120 S.Ct. at 2135 (dissenting opinion) (stating: "If the State argues that the defendant will be a future danger to society, it quite plainly rebuts that argument to point out that the defendant . . . will never be part of society again."). See also Simmons, 512 U.S. at 162 ("grievous misperception" encouraged by "state's repeated suggestion that petitioner would pose a future danger to society); 512 U.S. at 163 (prosecutors in South Carolina often emphasize a defendant's future dangerousness in their evidence and

argument, and they urge the jury to sentence the defendant to death so he will not be a danger to the public if released); 512 U.S. at 168-69 ("If the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future . . .").

If Petitioner is correct that the state raises future dangerousness by merely introducing evidence in the sentencing phase about a capital defendant's past criminal conduct and bad acts, then the future dangerousness prong of Simmons would be superfluous and Simmons would apply to every capital case where the only alternative sentence to death was life without parole. Indeed, introduction of the charged crime's circumstances itself would thereby automatically raise future dangerousness. Justice O'Connor flatly rejected such a view in Simmons:

> "Likewise, if the prosecution does not argue future dangerousness, the State may appropriately decide that parole is not a proper issue for the jury's consideration even if the only alternative sentence to death" is life without parole.

512 U.S. at 175 (O'Connor, J., concurring). Similarly, the Simmons plurality also implied that character, prior criminal history, and background are not the same thing as future dangerousness. 512 U.S. at 164 ("The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, *in addition to future dangerousness*, that a jury may consider in fixing punishment." (Emphasis added)). Further, both the Simmons plurality and Justice O'Connor in concurrence recognized that the state could legitimately argue that the defendant would be a future danger to other inmates and prison staff, without triggering the rule in Simmons. 512 U.S. at 165 n. 5; 512 U.S. at 177.

It is *the use to which the prosecution puts the evidence* which triggers the due process right of rebuttal in Simmons. See Skipper v. South Carolina, 476 U.S. 1, 5 n. 1 (1986) (noting that the relevance of probable future conduct in prison is underscored by the prosecution's argument, which urged the jury to return a death sentence because the defendant could not be trusted in prison, and noting that the due process right of rebuttal is triggered when the "prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty"). A number of other jurisdictions have also noted the distinction between pointing out a defendant's character and other bad acts, and raising future dangerousness. See State v. Bey, 736 A.2d 469 (N.J. 1999) ("prior murder" aggravator did not raise future dangerousness); State v. Bey, 709 N.E.2d 484 (Ohio 1999) (prosecutor did not raise future dangerousness by reviewing evidence of defendant's character, background, and history in response to adaptability evidence); Commonwealth v. May, 710 A.2d 44, 47 (Pa. 1998) (evidence of prior criminal conduct does not necessarily raise future dangerousness). Indeed, there are many types of evidence known to law which are admitted for one purpose but not another. See, e.g. Fed. R. Evid. 404(b).

Finally, prosecutors are not simply putting on a dangerousness case and calling it a different name, as Petitioner contends. There is simply a large difference between merely pointing out the bad things a defendant has done in addition to the charged murder, and: (1) putting up mental health experts to testify that in their opinion Petitioner will be a future danger, or (2) submitting to the jury an express future dangerousness aggravator, or (3) having the prosecutor pound the podium and tell the jury, "You must put this defendant to death or he will kill somebody in society again in the future". The latter are

types of an express future dangerousness case to which the rule in Simmons was aimed.

The South Carolina Supreme Court properly applied the test set forth in Simmons, and correctly ruled that evidence and argument about Petitioner's other bad conduct did not amount to the prosecution specifically relying on Petitioner's future dangerousness asa a basis for death. Since the prosecution did not use future dangerousness to society, due process did not require rebuttal with information about the unavailability of parole. Certiorari should be denied.

D. The rule in Simmons was satisfied by the defense argument about the finality of a life sentence.

Even if this Court finds *Simmons* was triggered, the defense's closing argument and the judge's charge fulfilled the requirements of *Simmons*.

Simmons stated that its mandate would be satisfied if information about the defendant's parole ineligibility is presented to the jury through *either* an instruction from the court or argument of defense counsel. 512 U.S. at 169, 177.[2]

In his sentencing phase closing, Petitioner's counsel repeatedly told or implied to the jury that Petitioner would never leave prison if he received a life sentence. **{R. 2049 ll. 17-22; 2051 ll. 6-9; 2056 ll. 10-12; 2060 ll. 7-11}**. In addition, Petitioner's counsel said that "a wife and a kid and car" would "never happen for Billy Kelly, ever", that life in prison was a "slow death", and that Petitioner would "never see the light of daylight again". **{R. 2049 ll. 17-22; 2051 ll. 6-9; 2056 ll. 10-12; 2060 ll. 7-11}**. When combined with the judge's charge that life imprisonment was to be understood in its plain and ordinary meaning, the defense arguments prevented the jury from being faced with the "false dilemma" condemned by Simmons. 512 U.S. at 171.

Thus, there was no due process violation, and certiorari should be denied.

[2] In *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994), *overruled on the grounds in State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995), the South Carolina Supreme Court held that trial courts had to give life without parole instructions if the *Simmons* 2-prong test was met and the defendant requested such an instruction. However, the issue before this Court in the present case concerns only the federal constitutional mandate in *Simmons*, and not any purely state law expansion of the rule.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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By: _____

May 7th, 2001

*Counsel of Record

No. 00-9280

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

WILLIAM ARTHUR KELLY,

Petitioner,

vs

STATE OF SOUTH CAROLINA,

Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, S. Creighton Waters, who being duly sworn, deposes and says that he served the foregoing **Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina** on the Petitioner by depositing two (2) copies of the same in the United States mail, first-class postage prepaid, and addressed to David I. Bruck, Esquire, Post Office Box 11744, Columbia, South Carolina 29211, (803) 765-1044. He further certifies that all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of May, 2001.

S. Creighton Waters

SWORN to before me this
7th day of May, 2001.

(LS)
Notary Public for South Carolina
My Commission Expires: 8-7-2010